



Respondent argues claimant did not establish good cause and that the ALJ's Order should be affirmed.

The issues the Board must consider are:

1. Did claimant prove good cause to extend the five-year deadline set forth in K.S.A. 2006 Supp. 44-523(f)?
2. Did the ALJ err in dismissing this claim with prejudice?

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings:

On September 5, 2007, Michael C. Gillespie, one of claimant's attorneys,<sup>3</sup> filed with the Division of Workers Compensation a form K-WC E-1, application for hearing. The application stated the date of accidental injury or occupational disease was approximately April 2007. The cause of claimant's injury or disease was alleged to be "[e]xposure to & inhalation of toxic fumes and substances from garbage and animal carcasses." Claimant alleged the nature of his injury or disease was "cancer of the vocal cords."

By letter dated September 10, 2007, Patrick M. Salsbury entered his appearance on behalf of respondent.

There was no hearing or other activity reflected in the Division's file for approximately 12 months after the application for hearing was filed and the claim was administratively placed on inactive status. The claim remained on inactive status until September 4, 2012, when Mr. Gillespie filed the Motion to Extend. Respondent filed its response on September 12, 2012. At some point in September 2012 there was a conference call among counsel and the ALJ. No record of that conference call was made.

A hearing on the Motion to Extend was held on October 30, 2012. The transcript of that hearing shows a letter was sent from Mr. Salsbury to Mr. Gillespie dated August 30, 2007.<sup>4</sup> The letter requested claimant's attorney to forward copies of medical records and to have claimant execute medical authorizations. No testimony was presented at the motion hearing. Only statements of counsel and the ALJ's comments were transcribed.

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<sup>3</sup> The other attorney for claimant is Richard H. Seaton. Mr. Seaton and Mr. Gillespie were in the same law firm when the application for hearing was filed. They have since formed separate practices.

<sup>4</sup> M.H.Trans., Resp. Ex. A.

The following exchange occurred at the motion hearing:

**JUDGE SANDERS:** Mr. Gillespie, when did -- when did the claimant reach maximum medical improvement?

**MR. GILLESPIE:** I believe, Your Honor, it was somewhere mid-2009, somewhere in there. I can't give you an exact date. I should have written that down.

**JUDGE SANDERS:** Okay.

**MR. GILLESPIE:** And then that was about the time again that we had this complex medical malpractice action that we were working with him.

**JUDGE SANDERS:** And I would assume that he has incurred a lot of medical bills.

**MR. GILLESPIE:** He has, Your Honor.

**JUDGE SANDERS:** And it would seem like to me that one of the solutions for that would be to go to a preliminary hearing and attempt to get the respondent to pay for those. I'm just asking --

**MR. GILLESPIE:** I agree.

**JUDGE SANDERS:** I'm just asking how -- why was that avenue not pursued or --

**MR. GILLESPIE:** Well, in all honesty, Your Honor, as I've said earlier, I think that, you know, Mr. Seaton and I, in all candor, didn't coordinate this case well. You know, I was new to it. I -- there were times I probably should have gone to Mr. Seaton for guidance when I didn't. There were probably times that Mr. Seaton should have prodded me along.

**JUDGE SANDERS:** Okay. Anything else you'd like to say at this time, Mr. Gillespie?

**MR. GILLESPIE:** I don't think so, Your Honor, thank you.<sup>5</sup>

Mr. Salsbury acknowledged that he received some medical records from claimant's counsel after the telephone conference among the attorneys and the ALJ in September 2012. Mr. Salsbury stated the medical records did not indicate any connection between claimant's vocal cord cancer and his employment with respondent. No medical records or

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<sup>5</sup> M.H. Trans. at 14-15.

reports were offered into evidence at the motion hearing. The record contains no evidence that claimant at any time issued a written demand for medical treatment or temporary total disability compensation.<sup>6</sup> No form E-3, application for preliminary hearing, was ever filed.

There appears to be no disagreement that claimant was diagnosed with cancer of the larynx in early 2007; that he underwent radiation treatment for several months; and that his larynx was removed surgically in August 2008. Among Mr. Salsbury's comments at the motion hearing was that respondent had no opportunity to have claimant medically examined before his larynx surgery. Respondent contends it was prejudiced by the five-year delay in claimant's prosecution of the claim.

The parties apparently also do not dispute that claimant's Motion to Extend was filed before the expiration of the five-year period commencing with the date the application for hearing was filed on September 5, 2007.

Other facts will be incorporated as necessary in the analysis below.

#### **PRINCIPLES OF LAW**

K.S.A. 2006 Supp. 44-523(f) provides:

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

#### **ANALYSIS**

The Board finds the ALJ's Order should be affirmed.

Claimant's counsel lists the following reasons to support his position that good cause was proven:

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<sup>6</sup> Counsel for claimant indicated he sent a demand for medical compensation dated November 6, 2008. Although the letter was addressed to Mr. Salsbury, it was delivered to Art Chalmers, an attorney in Wichita, Kansas, who is not involved in this claim.

1. Claimant did not achieve maximum medical improvement (MMI) until 2009, a “prolonged period of time following his cancer surgery.”<sup>7</sup>

2. Claimant experienced reoccurring infections of the surgical site and stoma.

3. Claimant has difficulty communicating verbally with his counsel, which “hampers case preparation.”<sup>8</sup>

4. Counsel for claimant have handled a number of other legal matters on claimant’s behalf, including a dental malpractice suit, a collection matter, a wage claim, and an employment discrimination claim. These other matters have consumed a great deal of claimant’s time and the time of Mr. Gillespie and Mr. Seaton.

5. The number of legal matters handled for claimant by his attorneys resulted in a “great deal of file confusion” and “internal confusion,” including misfiled documents.<sup>9</sup>

“Good cause” is not defined in the Kansas Workers Compensation Act, although the same phrase is used in K.S.A. 44-523(b)(3), which concerns extensions of terminal dates.

Before the enactment of K.S.A. 44-523(f) in 2006,<sup>10</sup> the Act had no provision for the disposition of claims for lack of prosecution. In *Bergstrom*,<sup>11</sup> the Kansas Supreme Court held:

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

The plain, unambiguous language of K.S.A. 44-523(f) expresses the intention of the legislature to place a five-year limitation on the prosecution of claims following the date they are formally docketed with the Division. Before the expiration of the five years, claims

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<sup>7</sup> Claimant’s brief at 3 (filed December 5, 2012).

<sup>8</sup> *Id.* at 4.

<sup>9</sup> M.H. Trans. at 9-12.

<sup>10</sup> It should be noted that the amendments to the Act which became effective on May 15, 2011, significantly changed the 2006 version of K.S.A. 44-523(f). The New Act version is embodied in K.S.A. 2011 Supp. 44-523(f)(1)(2) and (3) is not applicable to this claim. See K.S.A. 44-505(c).

<sup>11</sup> *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

must have proceeded to regular hearing, settlement hearing or agreed award. If not, the claim shall be dismissed for lack of prosecution. The sole exception to the five-year limit is when good cause is shown for an extension. There is a conclusive presumption of good cause if a claimant has yet to reach MMI, however, no party alleges that presumption is applicable here.

The Board has carefully considered the facts and the law in this claim and concludes there is no basis to disturb the findings and conclusions of Judge Sanders. There is no good cause to extend the five-year deadline.

Although this claim had been docketed for five years, no prehearing settlement conference was ever requested. No application for preliminary hearing was filed. No medical record or expert opinion was secured to support the compensability of the claim. Claimant reached MMI in 2009 and despite the passage of three years thereafter, nothing was done to move the claim toward disposition by settlement or hearing.

The confusion which existed in the offices of claimant's counsel is immaterial, as is the number of other legal matters counsel undertook to handle on behalf of claimant. Claimant's inability to communicate verbally was a relatively minor obstacle because claimant remained able to express himself in writing at counsel's office. Written communications would also have been available via letters or e-mail. Claimant's spouse was, accordingly to the record, available to assist in the exchange of information between claimant and his counsel.

The five-year delay in prosecuting the claim resulted in potential prejudice to respondent. Defense counsel did not receive the medical records which claimant's counsel had gathered until five years after the production of such records was demanded by Mr. Salsbury. The medical authorizations were evidently received by claimant's counsel but were not executed and returned to Mr. Salsbury because they were not matched with Mr. Trotter's workers compensation file. Defense counsel accordingly had no means to gather medical records, which would have been vital to secure an expert medical evaluation by respondent. Moreover, witnesses who may have been available to testify earlier during the pendency of the claim may have moved, retired, or may be otherwise unavailable to provide evidence in the claim.

The length of time it took claimant to reach MMI and the reoccurring infection to which claimant's counsel refers also provides no basis to support a finding of good cause.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings

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<sup>12</sup> K.S.A. 2006 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**CONCLUSIONS OF LAW**

1. Claimant did not show good cause necessary to extend the five-year period required by K.S.A. 2006 Supp. 44-523(f) in which a regular hearing, settlement hearing or agreed award must occur.

2. The ALJ correctly dismissed this claim with prejudice.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Order on Motion to Extend of ALJ Rebecca A. Sanders dated November 9, 2012, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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